

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EBRAHIM PAKZAD,

Plaintiff(s),

No. C 03-2863MHP

v.

ORDER

MARK HOPKINS INTERCONTINENTAL
SAN FRANCISCO, PETER SPAULDING,
DAVID SCHWEITZER, AND DOES 1 through
100, inclusive,

Defendant(s).

Plaintiff brought this action in the Superior Court for the County of San Francisco and it was timely removed by the defendants based on diversity jurisdiction and an allegation of fraudulent joinder as to the one non-diverse defendant. Plaintiff now moves to amend his complaint and to remand the action to state court. It is not disputed that defendants Mark Hopkins and Peter Spaulding are diverse defendants. The focus of removal is David Schweitzer who is a citizen of California as is the plaintiff. The court has reviewed the moving papers, opposition and reply filed in this action as well as the removed complaint, the notice of removal and the documents appended to each of these pleadings. The matter was deemed submitted on the papers without oral argument rather than granting a continuance on what is a relatively straightforward case -- but not entirely straightforward.

The original complaint named the three defendants, Mark Hopkins, Spaulding and Schweitzer, in the caption. Plaintiff alleged causes of action for disability discrimination, failure to provide reasonable accommodation, retaliation, failure to takes steps to prevent discrimination and failure of interactive discussion. Neither Spaulding nor Schweitzer was named in the headings to the various causes of action and they were not mentioned by name in any of the causes of action. They were lumped together under the rubric "defendants". The only mention of these two individual defendants in the body of the complaint is

1 describing their identities and capacities as "supervisor and manager and as such had control over, directed
2 work and performance of, and supervised and managed Plaintiff." Plaintiff's Complaint at ¶2. Plaintiff also
3 alleges he filed a "complaint" with the California Department of Fair Employment and Housing ("DFEH")
4 regarding "discrimination, denial of accommodation, and retaliation" by all defendants and mentions each by
5 name. Id. at ¶14. Otherwise the complaint only mentions Mark Hopkins and in other places refers to
6 defendants, but never mentions the names of Spaulding and Schweitzer, except in paragraph 88 where it
7 mentions in the claims for "failure of interactive discussion" that plaintiff had made known his disability to
8 them.

9 Unfortunately, in determining whether to remove the action to federal court defendants were left to
10 guess as to which claim or claims were being asserted against the individual defendants. Unfortunately, they
11 were all too quick to guess in their own favor rather than test the pleadings or attempt to get clarification. It
12 is clear under the California Fair Employment and Housing Act ("FEHA") law that an individual defendant
13 may be personally liable for retaliation. Winarto v. Toshiba America Electronics Components, Inc., 274
14 F.3d 1276, 1288 (9th Cir. 2001) . The complaint could be interpreted as making a claim against defendant
15 Schweitzer for retaliation. On the other hand each of the claims including ones that could not be made
16 against an individual defendant uses the language *defendants*, thus making it difficult to divine what claims, if
17 any, were asserted against Spaulding and Schweitzer. Indeed, the complaint does not lend itself to
18 interpretation, but rather requires powers of divination.

19 Now that plaintiff seeks to amend his complaint, albeit poorly, it is clear that the single claim he
20 makes against Schweitzer is for retaliation, a claim that is cognizable against defendants individually rather
21 than solely against the "employer".

22 The court must now return to the question of fraudulent joinder. Joinder of a non-diverse defendant
23 is deemed fraudulent, and the defendant's presence in the complaint is ignored for purposes of determining
24 diversity, "[i]f the plaintiff fails to state a cause of action against a defendant, and the failure is obvious
25 according to the settled rules of the state." McCabe v. General Foods Corp., 811 F.2d 1336, 1339 (9th
26 Cir. 1987). There is a presumption against finding fraudulent joinder and defendants asserting such claims
27 carry a heavy burden of persuasion. See Nishimoto v. Federman-Bachrach & Assocs., 903 F.2d 709,
28

1 712 n.3 (9th Cir. 1990). Defendants must demonstrate that there is no possibility that the plaintiff will be
2 able to establish a cause of action in state court against the alleged sham defendant.

3 The difficulty in this case is that the failure to state a cause of action is not because there is no
4 plausible one, but that the inartful pleading makes it difficult to tell what the claim is. This is not a case of
5 "artful pleading" in order to plead around a federal claim or diversity, but a case of inartful pleading that is
6 cured in federal court by a motion pursuant to Federal Rule 12(b)(6) for failure to state a claim. Under a
7 true 12(b)(6) claim the court would ordinarily allow leave to amend in order to permit plaintiff another
8 opportunity to plead the claim so as to state a claim if he could. Now that plaintiff is in federal court he
9 seeks to amend so that he can state a claim that will give him an exit from federal court by way of remand
10 because of a lack of complete diversity.

11 If the court were to find that there was fraudulent joinder in this case, the question of whether
12 plaintiff should be allowed to amend would be easy to answer. The same would occur if plaintiff sought to
13 amend to add a previously unnamed defendant who was non-diverse. After a case is removed and a party
14 amends or seeks leave to amend the court has two options, it can allow joinder of a non-diverse defendant
15 and remand the action to state court or deny joinder and the action will remain in federal court, providing
16 jurisdiction is otherwise proper. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1068 (9th Cir.
17 2001)(involving addition of non-diverse defendants other than the fraudulently joined one after fraudulent
18 joinder found). However, if the court finds there is no fraudulent joinder of the non-diverse defendant or
19 defendants named in the complaint pending in state court before removal, there is no subject matter
20 jurisdiction and the court has no power to entertain a motion to amend.

21 In this case the court finds that defendant Schweitzer was not fraudulently joined. There is a
22 possible claim, retaliation, that can be stated against him and under settled rules of state law he may prevail
23 on such a claim. It is just that plaintiff has badly pled it. He has not done much better in his proposed
24 amended complaint. Apparently he thinks it sufficient to put the defendant's name in the heading to the
25 section alleging the retaliation claim without making any specific allegations as to the individual defendant's
26 conduct. As stated above, this is not fraudulent joinder but sloppy pleading. This judge is not a State
27 Court Judge and has no expertise in demurrers, but the claim may well be demurrable with leave to amend.
28

Considering the quality of the pleadings in this case, while plaintiff's motion to remand is granted for failure of defendants to meet their burden of establishing fraudulent joinder, the court does not award fees and costs to plaintiff under 28 U.S.C. 1447(e). Plaintiff's motion to amend is denied for the reasons stated above.

The Clerk of Court shall transmit a certified copy of this order to the Clerk of Court for the Superior Court of the County of San Francisco.

IT IS SO ORDERED.

/s/
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California